Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1561

MICHAEL RICHARD O'CONNER, et al. - Petitioners

versus

CITY OF LOUISVILLE FIREFIGHTERS PENSION FUND . . . . . Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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May it please the Court:

COUNTERSTATEMEN. OF THE CASE

The Statement of the Case contained in the Petition is essentially correct in its recitation of the bare facts, but it is extremely misleading insofar as it implies that Petitioners have argued their case on federal constitutional grounds from the outset.

In fact, the Complaint filed by Petitioners in the trial court (A. 7-8) contains no allegations based on, or references to, the United States Constitution. Petitioners' motion for summary judgment in the trial court (A. 9-10) contains a single passing citation to the

Due Process Clause, and no reference whatsoever to the Equal Protection Clause. This single citation, moreover, is the sole occurrence of a constitutional argument by Petitioners or anyone else in the entire record. Neither Petitioners' brief nor Respondent's brief to the Supreme Court of Kentucky raised any constitutional questions, and neither the opinion of the trial court (Petition, 17-18) nor the opinion of the Supreme Court of Kentucky (Petition, 20-21) mentioned or relied on the United States Constitution.

In short, this is a case that was argued to, and decided by, the courts of Kentucky purely on state law grounds. The Petition represents a desperate, last-gasp effort by Petitioners to avoid defeat by raising a federal constitutional question in a case in which, as the Argument set forth below demonstrates, no such question is present.

ARGUMENT

The two questions which Petitioners have presented to this Court have been decided adversely to them many times by this Court and the lower federal courts.

1. *Due Process.* Petitioners contend that their right to due process of law is violated by a statutory scheme that denies them a refund of pension fund contributions, which Petitioners insist are their "personal funds" (Petition, p. 6). Petitioners' posture before this Court with respect to this claim was well summarized in *Muzquiz* v. *City of San Antonio,* 378 F. Supp. 949, 955-56 (W.D. Tex. 1974) as follows:

> [The Petitioners] are asking [this Court] to reverse 85 years of unbroken Constitutional law at the Federal level beginning at the Supreme Court with the landmark case of Pennie v. Reis, 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 426 (1889) and culminating in Flemming v. Nestor, 363 U. S. 603, 611, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1959) and reiterated in decisions of the 1st, 3rd, 5th, 6th, 9th and District of Columbia Circuits as well as in the District Courts of the country and in the majority of state courts that have considered this matter.

It is settled beyond any doubt, therefore, that pension fund contributions such as those made by Petitioners are, under the rationale of *Pennie* v. *Reis,* "inextricably public monies whose disposition is wholly at the discretion of the State and which forever retain that character." 378 F. Supp. at 957. Because the contributions are public monies, Petitioners have no property right in them. As stated by this Court in *Pennie* v. *Reis:*

> The State impaired no absolute right of property in the police officer . . . . The fund . . . was subject to change or revocation at any time, at the will of the legislature . . . . Until the particular event should happen upon which the money, or a part of it, was to be paid, there was *no vested right* in the officer to such payment. His interest in the fund was, until then a mere expectancy, created by the law, and liable to be revoked or destroyed by the same authority . . . . Such being the nature of the intestate's interest in the fund . . . *there was no right of property in him* of which he or his representative has been deprived. 132 U. S. at 470-472 (emphasis added).

2. *Equal Protection.* Assuming that Petitioners—who never mentioned the Equal Protection Clause at any stage of these proceedings until they filed this Petition—have preserved an Equal Protection claim for presentation to this Court, that claim is as meritless as is their Due Process claim.

Petitioners contend that their right to equal protection of the laws is violated by a statutory scheme that denies firemen in Louisville a refund of pension fund contributions while allowing such a refund to firemen in other less populous cities in Kentucky. Thus, this case is similar to *Muzquiz* v. *City of San Antonio, supra,* in which the plaintiffs argued that the statute in question unconstitutionally differentiated between (a) policemen and firemen in San Antonio as opposed to other San Antonio city employees, and (b) policemen and firemen in San Antonio, Houston, Dallas and El Paso as opposed to policemen and firemen in other less populous cities in Texas. The court, relying on *Dandridge* v. *Williams,* 397 U. S. 471 (1970) and *Carmichael* v. *Southern Coal and Coke Co.,* 301 U. S. 495 (1936), held that these distinctions were not violative of the plaintiffs' right to equal protection of the laws, because they had a rational basis. The court dismissed plaintiffs' argument in words that are particularly applicable here:

> The distinctions between city employees here then not only have some "relevance" to the purpose of the classification, but they [are] the very *raison d'etre* of the classification—and we consider this a particularly apt case for the application of the rule

> of judicial deference to legislative classifications, especially when they are of a peculiarly local nature [citations omitted]. 378 F. Supp. at 959-60.

CONCLUSION

For the reasons stated above, Respondent submits that the Petition for Writ of Certiorari to the Supreme Court of Kentucky should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

JEFFERSON CIRCUIT COURT

COMMON PLEAS BRANCH, SIXTH DIVISION

No. 206785

MICHAEL RICHARD O'CONNER,
ALLEN PEAVLER, and
RICHARD M. SHUTTS - - - - - - *Plaintiffs*

v.

CITY OF LOUISVILLE FIRE FIGHTERS PENSION FUND
1137 West Jefferson Street
Louisville, Kentucky - - - - - *Defendant*

COMPLAINT—Filed October 8, 1975

Comes the plaintiffs, Michael Richard O'Connor, Allen Peavler, and Richard M. Shutts, and for their cause of action states as follows:

1. That all three plaintiffs have resigned from the City of Louisville Fire Fighters. That further Michael Richard O'Conner was a Fire Fighter from September, 1970 to May, 1975; that Allen Peavler was a Fire Fighter from 1971 to May, 1975; and that further Richard M. Shutts was a Fire Fighter from September 7, 1971 to September 17, 1975.

2. That as a consequence of said employment the plaintiffs participated in a conpulsory retirement fund through the City of Louisville Fire Fighters Retirement Fund.

3. That demand has been made upon the defendant for a refund or a return of the money so contributed by the plaintiffs as follows: Michael Richard O'Connor, $2,182.34; Allen Peavler, $2,024.20; Richard M. Shutts, $2,255.36; but said defendant has wrongfully refused to comply with said demand and converted said monies to their own use.

WHEREFORE the plaintiffs, Michael Richard O'Connor, Allen Peavler, and Richard M. Shutts demands judgment against the defendant, City of Louisville Fire Fighters Pension Fund, in the total amount of Six Thousand Four Hundred Sixty One Dollars and Ninty Cents ($6,461.90), their cost herein expended and for all other relief to which they may appear entitled.

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APPENDIX B

JEFFERSON CIRCUIT COURT

COMMON PLEAS BRANCH, SIXTH DIVISION

No. 206785

MICHAEL RICHARD O'CONNOR,
ALLEN PEAVLER, and
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CITY OF LOUISVILLE FIRE FIGHTERS PENSION FUND
1137 West Jefferson Street
Louisville, Kentucky - - - - *Defendant*

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MOTION FOR SUMMARY JUDGMENT

Please take notice that on the 24th day of November, 1975, at 11:30 a.m. in the courtroom of the above court that the undersigned will make the following motion and tender the order as set out below.

MOTION

Comes the plaintiffs, Michael Richard O'Connor, Allen Peavler, and Richard M. Shutts, by counsel and moves the court pursuant to Rule 56 of the Kentucky Rules of Civil Procedure for a Summary Judgment against the defendant,

City of Louisville Fire Fighters Pension Fund, on the grounds that no genuine issue as to any material fact exist and that the plaintiffs are entitled to have a judgment entered for them as a matter of law. Plaintiffs intend to rely on the recent decision of Policeman's and Firemen's Fund of the City of Newport, Et Al v. Etzel A. Shields, Sr. decided by the Court of Appeals March 21, 1975, attached herein as plaintiffs Exhibit A.

Further plaintiffs intend to rely on a similar decision granting a summary judgment in behalf of the plaintiff entitling him to the return of his pension funds under similar circumstances in a case styled as Civil Action #199167, William K. Bryant v. Louisville Policeman's Retirement Fund, Jefferson Circuit Court, Common Pleas Branch, Sixth Division; and the Constitution of the United States Amendment #14 in that the taking of the property herein is without due process of law.

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